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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 571

CARLOS MARCELLO,

Petitioner

v.

HERBERT BROWNELL, JR., ATTORNEY GENERAL OF THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

The petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia remanding the case to the District Court with directions to dismiss the complaint upon the ground of mootness. Judge Bazelon dissented (R. 39).

Opinions Below

Neither the District Court nor the Court of Appeals rendered opinions herein. The judgment of the District Court is set forth at page 24 of the record and that of the Court of Appeals at page 39. These judgments are set forth in the appendix herein.

Jurisdiction

The judgment of the Court of Appeals was entered on August 1, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

Questions Presented

1. Whether sections 242(c) and (d) of the Nationality Act of 1952 [8 U. S. C. 1252(c) and (d)] forbid the grant of advance notice of deportation to an alien and whether these sections override a stipulation with the Government requiring such notice.

2. Whether a stipulation requiring three days' notice of deportation executed by the Government, filed in a proceeding before a Justice of this Court, has an implied provision that it shall expire six months after litigation by reason of section 242(c) of the Immigration and Nationality Act [8 U. S. C. 1252(c)].

3. Whether the Court of Appeals properly remanded the cause to the District Court with directions to dismiss the complaint upon the ground of mootness and properly refused to decide the balance of the case where both parties conceded that an issue remained requiring appellate determination.

Statutes Involved

Section 242(c) of the Immigration and Nationality Act of 1952 (66 Stat. 210; 8 U.S.C.A. 1252-c) reads as follows:

> "When a final order of deportation under administrative processes is made against any alien, the Attorney General shall have a period of six months from the date of such order, or, if judicial review is had, then from the date of the final order of the court, within which to effect the alien's departure from the United States, during which period, at the Attorney General's

discretion, the alien may be detained, released on bond, in an amount and containing such conditions as the Attorney General may prescribe. Any court of competent jurisdiction shall have authority to review or revise any determination of the Attorney General concerning detention, release on bond, or other release during such six-month period upon a conclusive showing in habeas corpus proceedings that the Attorney General is not proceeding with such reasonable dispatch as may be warranted by the particular facts and circumstances in the case of any alien to effect such alien's departure from the United States within such six-month period. If deportation has not been practicable, advisable, or possible, or departure of the alien from the United States under the order of deportation has not been effected within such six-month period, the alien shall become subject to such further supervision and detention pending eventual deportation as is authorized in this section . . ."

Section 242(d) of the Immigration and Nationality Act of 1952, 66 Stat. 163, 208, 211, as amended September 3, 1954, 68 Stat. 1232, 8 U.S.C. (1952 ed. Supp. II) 1252(d), provides:

"Any alien, against whom a final order of deportation as defined in subsection (c) heretofore or hereafter issued has been outstanding for more than six months, shall, pending eventual deportation, be subject to supervision under regulations prescribed by the Attorney General. Such regulations shall include provisions which will require any alien subject to supervision (1) to appear from time to time before an immigration officer for identification; (2) to submit, if necessary, to medical and psychiatric examination at the expense of

the United States; (3) to give information under oath as to his nationality, circumstances, habits, associations, and activities, and such other information, whether or not related to the foregoing, as the Attorney General may deem fit and proper; and (4) to conform to such reasonable written restrictions on his conduct or activities as are prescribed by the Attorney General in his case. * * *"

Statement

Following this Court's decision in *Marcello* v. *Bonds*, 349 U.S. 302 (1955) the Immigration and Naturalization Service required petitioner to surrender for deportation on August 17, 1955. Thereafter, on August 26, 1955, petitioner filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Louisiana, alleging, *inter alia*, that the Government of Italy had revoked travel documents permitting the petitioner's deportation to Italy, that the Attorney General was unable to effectuate the petitioner's immediate deportation, and that his detention was unlawful. The writ was dismissed by the District Court, and an appeal noted. Both the District Court and the United States Court of Appeals for the Fifth Circuit denied bail pending appeal. Upon application to the United States Supreme Court for release on bail pending appeal, Mr. Justice Hugo L. Black on September 16, 1955, entered an order providing (R. 17):

"That the petitioner, Carlos Marcello be released from custody and admitted to bail until his deportation can be effectuated, Provided, however, that the petitioner shall execute and file with the Clerk of the District Court of the Eastern District of Louisiana a good and sufficient surety in the sum of $10,000.00 condi-

tioned that he will appear for deportation upon three days notice when arrangements for his deportation have been completed, and the Immigration and Naturalization Service notifies him to appear."

The petitioner was thereafter released upon posting the required bond. On October 10, 1955, petitioner and the Government entered into two stipulations, the first between petitioner's counsel, Jack Wasserman, and the then Solicitor General of the United States, Honorable Simon E. Sobeloff. It provided as follows (R. 18):

> "It is hereby stipulated by and between counsel for the respective parties herein that the petitioner will be released upon administrative bail in the amount of $10,000.00 conditioned for his delivery into custody for deportation upon three days' notice, that such bond will be substituted for judicial bond previously executed herein and that, in view of the foregoing, counsel herein consent to the vacating of the Order of Mr. Justice Black dated September 16, 1955."

Upon the basis of the above stipulation on October 11, 1955, Mr. Justice Black vacated his prior order (R. 13).

Another stipulation was then executed between the parties which provided that in view of the release of the petitioner by the Immigration and Naturalization Service, the appeal pending in the Circuit Court of Appeals for the Fifth Circuit be dismissed upon the ground of mootness. The petitioner was then released upon administrative bond with a penalty of $10,000.00 conditioned, *inter alia*, that he surrender for deportation upon three days' notice by the Immigration and Naturalization Service.

On April 26, 1956, without warning or cause or hearing, the petitioner was directed to appear at the Office of the

Immigration Service at New Orleans. The administrative bond of October 19, 1955, was cancelled, and an order of supervision was imposed upon him. It restricted his movements to the City of New Orleans. (R. 22, 29.)

The Immigration Service advised petitioner's counsel that the stipulation of October 10, 1955, filed with Mr. Justice Black and requiring three days' notice of any contemplated deportation, was no longer recognized as valid,[1] stating (R. 23):

> "It is our understanding that the three day notice provision placed in the administrative bond, pursuant to your stipulation with the Solicitor General, ran only for the period during which judicial proceedings were pending in Marcello's case and for the six month period thereafter during which the Attorney General had authority under Section 242(c) of the Immigration and Nationality Act to detain Marcello or require him to post a substantial bond * * *. As we read the *Carlson*, *Yamish* and *Carlisle* opinions of the Supreme Court, the Service has authority (and I may add, a corresponding duty) under Section 242(d) of the Immigration and Nationality Act to impose such reasonable written restrictions * * *. It is therefore necessary to deny your request for the inclusion of a three day notice provision in the 'Order of Supervision' placed in effect in Marcello's case."

This litigation was instituted on May 16, 1956, to require compliance with the stipulation executed by the Solicitor

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[1] On November 1, 1956, the Immigration Service gave petitioner not the requisite three days' notice but only seventy-two hours' notice of its intention to deport. Three days' notice would have expired on November 4, 1956, a Sunday giving petitioner until November 5, 1956. Seventy-two hours would only give him until November 4th. In any event, the stipulation requires three days' notice prior to actual deportation so that petitioner may wind up his affairs. The Government admits that this notice will not be given in the future (R. 10).

General and to enjoin enforcement of the parole order restricting petitioner to New Orleans (R. 3).

The District Court granted summary judgment for the Government upon application by both sides for judgment (R. 24). After appeal to the Court of Appeals, the Government twice modified the parole supervision order finally removing the restriction to the City of New Orleans (R. 27, 37). The Court of Appeals, with one Judge dissenting, thereafter remanded the cause as to the parole supervision issue with directions to dismiss the complaint as to that question upon the ground of mootness (R. 39). The Government, however, acknowledged in its moving papers (R. 30, 34) as did petitioner (R. 32) that the issue remained as to the validity of the stipulation requiring three days' advance notice of deportation.

However, subsequent to August 1, 1957, petitioner was advised orally both by attorneys for the Government and by the Clerk's office of the Court of Appeals, that nothing further was pending in that Court and that the cause had been completely determined. This petition for a writ of certiorari followed.

Reasons for Granting the Writ

1. On October 10, 1955, the Solicitor General and counsel herein executed a stipulation providing for petitioner's release on administrative bail with the requirement that he would be given three days' notice of deportation. This stipulation has been repudiated (R. 21-23) and the Government frankly admits in its answer herein (R. 10) that it has no intention of giving petitioner three days' notice prior to effectuating his deportation. That it is morally decent and reasonable to give an alien who has been here since infancy an opportunity of three days to say farewell to his family and wind up his business affairs seems to have

no influence upon our immigration authorities.[2] That our Solicitor General agreed to what was morally decent and reasonable in a written stipulation filed in court, likewise seems of no consequence to those who administer our immigration laws. The position taken by the Government in the courts below was that section 242(c) of the Immigration and Nationality Act of 1952 [8 U.S.C. 1252(c)] does not authorize bail after six months subsequent to a final order of deportation, *Schrode* v. *Rowoldt*, 213 F. 2d 810 (C.A. 8, 1954), and, therefore, that the agreement of the parties herein automatically expired at the end of such period. In the first place, the statute specifically computes the six-month period as beginning to run subsequent to the termination of judicial review of the order of deportation, 8 U.S.C. 1252(c). In the instant case judicial review was pending herein to review the order of deportation in the District of Columbia in Nos. 13,595 and 13,653 (Court of Appeals) when the judgment of the District Court below was entered dismissing the complaint (R. 24). Secondly, the Immigration Service declares that this Court's decisions in *Carlson* v. *Landon*, 342 U.S. 524 (1951), *Yanish* v. *Barber*, 97 L. ed 1637 (1952) and *Carlisle* v. *Landon*, 97 L. ed. 1642 (1952) require such interpretation. We submit that this constitutes a misinterpretation of this Court's decisions. The proper interpretation of these cases and whether the Immigration and Nationality Act requires the termination of all agreements to give advance notice of deportation and of all bail bonds of aliens ordered deported at the end of such six-month period regardless of their consent is the important issue to be decided by this case. Over three

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[2] In recent years in an increasing number of cases, the Immigration Service has apprehended aliens and deported them without any advance notice. One, Joseph Accardi, was apprehended at home while his wife was out shopping. He was deported before she returned.

thousand aliens [3] in the United States have final orders of deportation outstanding against them for six months or more. Proper interpretation of our immigration laws in their cases, as well as the case at bar, will be controlled by the interpretation reached herein.

2. The decisions below permitting the Government to repudiate its stipulation is contrary to *United States* v. *Town of Clarksville*, 224 F. 2d 712, 713 (C.A. 4, 1955) where it was said:

> "Counsel contends that (a particular) provision would have been included in the stipulation if it had been thought of. The answer to this, then, is that counsel should have thought of it. From the stipulation it is not clear that such matters were not considered * * *. The stipulation was entered into fairly and freely by both parties. Accordingly, the stipulation is binding and we must enforce it."

In the face of a stipulation which unequivocally provides, without limitation as to time, for three days' notice prior to petitioner's delivery into custody for deportation, the Government should not now be permitted to amend the stipulation to make it operative for a limited time only. The Government should be required to respect stipulations filed with the courts no less than private litigants.

3. The Circuit Court, with one judge dissenting, remanded the cause with directions to dismiss the complaint upon the ground of mootness even though both sides conceded that the issue raised by this petition remained in the case (R. 30, 32, 34). Mootness as to the issue of supervision was caused by the Government's amendment of its administrative order after oral argument before the Court of Appeals

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[3] Senate Report 1515 (81st Cong., 2d Sess., P. 637) states that in 1950 there were 3,000 nonenforceable deportation orders.

(R. 37). This did not moot the entire case for the issue relating to three days' notice remained as both sides conceded. If the disposition below does not deprive petitioner of the right to relitigate this issue in view of the dismissal for mootness, *United States* v. *Munsingwear*, 340 U.S. 36 (1950), then, if the decision below stands, petitioner will be required to resort to further litigation—ligitation which should be unnecessary. The issue as to the three days' notice requirement was properly raised below and should have been decided by the Court of Appeals. Whether cases may be thus partially mooted depriving a litigant of his day in the Court of Appeals as to all issues involved is an important question of appellate practice which should be determined by this Court.

Conclusion

For the reasons set forth herein, a writ of certiorari should issue.

Respectfully submitted,

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JUDGMENT OF THE DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

(Filed January 2, 1957)

This cause having come on for hearing on plaintiff's motion for summary judgment, and defendant's opposition thereto, and defendant having cross-moved for summary judgment, and plaintiff having been accorded an opportunity to oppose, and this Court having, on December 7, 1956, entered an order denying plaintiff's motion for summary judgment, and it appearing to the Court from the pleadings and certified documents herein and from the argument of counsel, that there is no genuine issue as to any material fact and that defendant is entitled to judgment as a matter of law, it is this 2nd day of January, 1957.

Ordered that defendant's cross-motion for summary judgment be and hereby is granted and the complaint herein be and the same is hereby dismissed.

BURNITA SHELTON MATTHEWS,
Judge.

JUDGMENT OF THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Before: Wilbur K. Miller, Bazelon, and Washington, Circuit Judges, in Chambers

ORDER

Upon consideration of appellant's motion to remand this case to the District Court with directions to vacate its judgment and to dismiss the complaint upon the grounds of mootness, it is

Ordered by the Court that the case be, and it is hereby, remanded to the District Court with directions to vacate its

judgment and with directions to dismiss as moot the complaint as to the question of the validity of restrictions imposed by the prior order of deportation, and, it is

Further Ordered by the Court that a certified copy of this order issue to the District Court forthwith.

Per Curiam.

Dated: August 1, 1957.

Circuit Judge BAZELON dissents.

(7391-6)